

# **2016 LEGAL ASSISTANT CONFERENCE**

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Prescott Resort & Conference Center  
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## **DUI TRENDS & UPDATES**

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## **DUI UPDATES & HOT TOPICS**



APAAG 2016 Legal Assistant Conference

## **CASE LAW UPDATES**

## **FOURTH AMENDMENT OPINIONS**

**MEDICAL MARIJUANA - SEARCH**

Scent of marijuana alone is insufficient to supply probable cause for search warrant of commercial warehouse.

*State v. Sisco*, 238 Ariz. 229 (App. 2015).

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**MEDICAL MARIJUANA - SEARCH**

- Odor of burnt marijuana provided grounds for warrantless search of a car.
- Questions *Sisco*

*State v. Cheatham*, 273 Ariz. 502 (App. 2015).

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**REYES - MEDICAL BLOOD DRAWS**

× State may rely in good faith on precedent prior to *McNeely*

× If get a medical blood draw motion - contact me

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### SEARCH INCIDENT TO ARREST CELL PHONE

- ✱ Police may not search a cell phone incident to arrest where cell phone is in same room but not within arrestee's reach at time of search
  - + Neither officer safety nor potential destruction of evidence theories apply to digital evidence
  - + Privacy interests attach to cell phones
- ✱ Search of cell phone not allowed to verify arrestee's identity
- ✱ Warrant obtained after search did not allow admission of photos found on phone

*State v. Ontiveros-Loya*, 237 Ariz. 472 (App. 2015).

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### PROLONGING STOPS - DOG SNIFFS

- ⊙ Police may not prolong a traffic stop for a dog sniff without additional reasonable suspicion
- ⊙ Authority for the seizure ends when the tasks related to the stop (getting paperwork, check for warrants, etc.) are or should be complete
- ⊙ Key Issue - does the dog sniff prolong the

*Rodriguez v. United States*, 135 S.Ct. 1609 (2015).

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### PROLONGING STOPS - DOG SNIFFS

- ✱ Good faith exception to exclusionary rule does not extend to prolonged traffic stops to wait for a drug dog in cases prior to *Rodriguez*
- ✱ *Rodriguez* did not announce new law in AZ (even though *Box* held a de minimus prolongation of a traffic stop to wait for a dog sniff wasn't unreasonable under the 4<sup>th</sup> Amendment)

*State v. Kjolsrud, et al*, 2 CA-CR 2015-0230

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### USE OF CRIMINAL HISTORY

- Officer may rely in part on suspect's criminal history to form reasonable suspicion
- Criminal history alone is never enough
- Def. driving rental car, no personal belongings, explanations were contradictory, extensive criminal record, unlabeled boxes packaged like drugs – this was enough to detain for dog sniff

*State v. Woods, 236 Ariz. 527 (App. 2015).*

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### STATE V. JENSEN, 1 CA-CR 14-0690

- \* State doesn't have to prove solution used to calibrate Intoxilyzer 8000 is NIST traceable
- \* It was not impermissible profile evidence when officer testified it is common for DUI suspects to minimize their drinking at the scene of a DUI stop
- \* Defendant is not entitled to a *Willits* Jury Instruction for officer's failure to video record FSTs.

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### IMPLIED CONSENT ADMONITION

- Reading "Arizona law requires you to submit to and successfully complete tests of breath, blood or other bodily substance . . ." to DUI suspect did not render consent involuntary.
- Supreme Court Opinion Expected Soon
- Officers Should be Using the New Form

*State v. Valenzuela, 237 Ariz. 307 (App. 2015).*

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**MARIJUANA DUIS**

**STATE V. DOBSON**

- × AMMA does not immunize medical marijuana cardholders from prosecution under § 28-1381(A)(3)

**STATE V. DOBSON**

- × AMMA provides cardholders affirmative defense if cardholder shows, by preponderance of evid. that marijuana or its metabolite was in concentration insufficient to cause impairment
- × Defendant bears the burden of proof by a preponderance of evidence

**STATE V. WEBERMAN**, NO. 2 CA-CR 2015-0049-PR  
(5/29/15)

\* *State ex rel. Montgomery v. Harris*, 234 Ariz. 343 (2014), is not a significant change in the law & is not a basis for post conviction relief under Rule 32.1(g).

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### **DUI HOT TOPICS**

- \* Marijuana
- \* Heroin is back
- \* Prescriptions
- \* Spice has made a return

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### **BREATH TESTING**

How it Works & Why We know It's Reliable




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## BREATH ALCOHOL ANALYSIS

DIRECT OXIDATION

- \* 1927 - Emil Bogen: The Diagnosis of Drunkenness; California and Western Medicine Vol XXVI, No 6
- \* Used Football to capture sample
- \* Won \$150 research price
- \* (\$1866 by today's standards)

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## BREATH ALCOHOL ANALYSIS

DIRECT OXIDATION

- \* 1938 - Rolla Harger
- \* Drunkometer
- \* Used colorimetric analysis
- \* Potassium chromate, silver nitrate, and sulfuric acid
- \* Turns from yellow to green
- \* Office compares color change to a chart

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## BREATH ALCOHOL ANALYSIS

DIRECT OXIDATION

- \* 1954 - Robert F. Borkenstein
- \* The Breathalyzer
- \* Used colorimetric analysis
- \* Potassium chromate, silver nitrate, and sulfuric acid
- \* Light meter measured change in color

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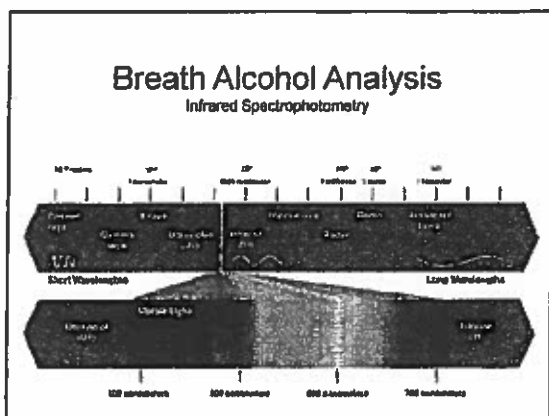
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Intoxilyzer 4011

Intoxilyzer 5000

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**BREATH TEST  
STATUTORY METHOD**

28-1323(A)

- 1) DHS/DPS Approved Device
- 2) Certified Operator
- 3) Duplicate Tests (includes deprivation period)
- 4) DHS/DPS Approved Checklist
- 5) Device in Proper Operating Condition (calibrations are enough)

28-1323(B) - these are the only requirements for admissibility

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[illegible]

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# BREATH ALCOHOL ANALYSIS

## QUALITY ASSURANCE

- \* Quality Assurance Specialist
- \* 31-day Calibration Check
- \* 90-day Standard Quality Assurance Procedure

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### MOTIONS TO SUPPRESS BREATH/BLOOD TESTS

- ✧ All State is required to do is lay basic foundation. Any remaining issues go to weight, not admissibility, of evidence.

*State v. Plew*, 155 Ariz. 44 (1987); *State v. Superior Court (Weant, RPI)*, 172 Ariz. 153 (App. 1992).

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### BATTLE OF THE EXPERTS

- ✧ Disagreements between experts go to weight, not admissibility. *State v. Velasco*, (Alday, RPI), 165 Ariz. 480, 486 (1990).
- ✧ Where there is a lack of unanimity in scientific community on accuracy of breath test, "the scientific disagreement affects only the weight and not the admissibility of evidence." *State v. Olivas*, 77 Ariz. 118 (1954).

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### BATTLE OF THE EXPERTS

- ✧ The determination of the credibility of witnesses is a question for the jury.

*State v. Rivera*, 116 Ariz. 449 (1977)

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## DEPRIVATION PERIOD

- \* "[A] failure to continuously observe a defendant continuously for 20 minutes prior to the administration of the test goes to the weight to be accorded the results of the test."

*State v. Corrales*, 135 Ariz. 105, 106 (App. 1982).

## MISSING/DEFECTIVE SQAPS

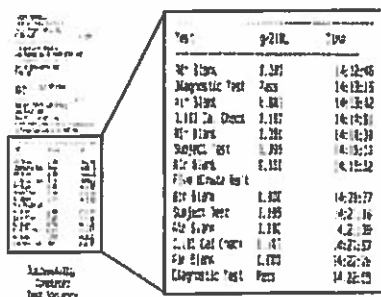
Only need periodic records.

*State v. Duber*, 187 Ariz. 425 (App. 1996); *State v. Superior Court* (Stock, RPI), 181 Ariz. 202 (1995).

ARS § 28-1323(A)(5)

- \* SQAPS
- \* Calibrations
- \* Bracketing calibrations on breath card
- \* Testimony of Criminalist

## Print Card Calibrations



Yes	g/210L	Time
10-11-05	0.105	14:12:46
Magnetic Test	Pass	14:12:15
11-11-05	0.101	14:12:42
11-11-05	0.107	14:12:51
11-11-05	0.105	14:12:59
SQAPS Test	0.105	14:13:11
11-11-05	0.101	14:13:12
Five Minute Test		
11-11-05	0.101	14:20:27
Subject Test	0.105	14:21:16
11-11-05	0.101	14:21:35
11-11-05	0.101	14:21:57
11-11-05	0.101	14:22:16
Magnetic Test	Pass	14:22:25

### INTOXILYZER BUILT IN SAFEGUARDS

- \* Mouth Alcohol Detection
- \* Duplicate Testing Procedure
- \* Four Processor Stability Checks
- \* Seven Air Blanks
- \* Two Bracketing Concurrent Reference Checks (with .10 solution)
- \* RFI (Radio Frequency Interferant) Detection
- \* Interferant Detection

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### SOME DISPLAYED/PRINTED MESSAGES

\* The following are some of the messages that may be obtained when conducting a breath test:

- \* Interferant Detect
- \* Mouth Alcohol
- \* Push Button Wrong Time
- \* RFI Detect
- \* Diagnostic Fail
- \* Out of Tolerance
- \* No 0.020 Agreement

The instrument is NOT malfunctioning!

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### COMMON DEFENSE EXPERT PLOYS

**Holding Breath**  
2,100 to 1

**Breath Temperature**



Silent Burp

Acetone

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### BREATH TEMPERATURE THE DEFENSE CHALLENGE

- ✖ Defendant May Have Had a Temperature
- ✖ An Increase in Breath Temperature Increases Reported Alcohol Concentration
- ✖ Throughout the Day, a Person's Temperature Increases – because the test was taken at night assume the defendant had a temperature (Fox and Hayward study)

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### BREATH TEMPERATURE DEFENSE CHALLENGE

- ✖ Irrelevant unless evidence is presented that defendant actually had an elevated temperature (*motion in limine*).
- ✖ Defense always presents the extremes – very unlikely Defendant was at that level.

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### BREATH TEMPERATURE DEFENSE CHALLENGE

- ✖ Hayward and Fox studies used core body temperature, not breath temperature.
- ✖ Did not test a naturally elevated temperature. All were artificially elevated (placed subjects in hot tubs or ice water).
- ✖ Studies only had 9 & 10 subjects (not a statistically proper sample).

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### BREATH TEMPERATURE

- \* Texas study by Mack Cowen - no significant correlation between either body or breath temp and breath alcohol concentration within the range of normal body temp.

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### 2100 TO 1

#### THE DEFENSE CHALLENGE

- \* 2100 to 1 is the breath to blood partition ratio built into breath testing instruments.
- \* Because the instrument has this built in conversion, it is possible that the defendant's blood alcohol concentration was lower than his/her breath test result.

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### 2100 TO 1

#### THE LAW

- \* Never relevant to the 28-1381(A)(2) or 28-1382(A) charges.
- \* May be relevant to the 28-1381(A)(1) charge:
  - + Subject to a 403 weigh.

*Guthrie v. Jones*, 202 Ariz. 273 (App. 2002); *Cooperman*.

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### 2100 TO 1

- ✖ Federal and state regulations require 2100 to 1 to be built into any evidentiary breath testing device.
- ✖ The average blood to breath ratio is actually 2350 to 1 (2400).
- ✖ This means the average breath test is actually 10% low compared to a blood test.

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### 2100 TO 1 AN EXAMPLE

- ✖ Defendant's breath test reads .10.
- ✖ Assuming the average blood to breath ratio of 2350 to 1 - his/her blood test would show a BAC of .11.

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### SILENT BURP (MOUTH ALCOHOL) THE DEFENSE CHALLENGE

#### Defendant

- + Burped or
- + Had ethanol in dentures/chewing tobacco etc.
- + This caused a falsely high breath test reading

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### **SILENT BURP**

✖ A silent burp will not lead to mouth alcohol. It requires actual liquid contents (containing ETOH) to be brought up from the stomach.

✖ Defense argument assumes none of the safeguards worked.

- + Observation/deprivation period
- + Mouth alcohol detector
- + Replicate breath tests within 5 - 10 minutes.

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### **SILENT BURP**

✖ How long since Defendant's last drink?  
If all alcohol is absorbed, there is none in the stomach to burp up.

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### **DEFENDANT HELD HIS/HER BREATH THE DEFENSE CHALLENGE**

✖ Holding One's Breath Prior to a Breath Test  
Increases the Reported Alcohol  
Concentration

✖ The Defendant Held His/Her Breath

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### DEFENDANT HELD HIS/HER BREATH

- ✖ Irrelevant Unless There is Evidence Defendant Held Breath (motion *In limine*).
- ✖ Officer Should Testify Defendant Did Not Hold Breath Prior to the Test.
- ✖ In the only two studies, the subjects held their breath for 15 and 30 seconds. A trained officer would notice this.

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### DEEP LUNG AIR THE DEFENSE CHALLENGE

- ✖ The deeper the breath, the higher the alcohol concentration

The longer they blow,  
the higher they go

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### DEEP LUNG AIR

- ✖ The deeper the breath, the closer the result to the actual alcohol concentration

Flaxmayer - *Alcohol and Breath Testing*, pg. 49

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### WHAT IS DEEP LUNG AIR?

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### DIABETES/ACETONE THE DEFENSE CHALLENGE

- ✱ Defendant is a Diabetic.
- ✱ A Person With a Diabetic Emergency Will Mimic the Effects of ETOH Impairment.
- ✱ The Acetone in Defendant's Body Caused the Driving, Bad FSTs, False High Reading, etc.

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### DIABETES/ACETONE THE FACTS

- ✱ Odor – acetone has a distinctive fruity odor.
- ✱ No Diabetic, Who Can Walk and Provide a Breath Test, Can Produce Enough Acetone in the Breath to Register on an Intoxilyzer.
- ✱ A Diabetic Will Stop Producing Acetone When ETOH is Introduced Into the System.

*Flaxmeyer – A Discussion Guide: Alcohol and Breath Testing.*

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### RADIO FREQUENCY INTERFERENCE (RFI)

- ✖ RFI was in the area,  
this could affect the  
readings

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### RFI

- ✖ RFI must be present
- ✖ Duplicate Tests rule out
- ✖ Instrument has a RFI detector
- ✖ Instrument is lined with copper paint

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### Questions?

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